Tesco PLC d/b/a Fresh & Easy Neighborhood Market, Inc. *and* United Food and Commercial Workers International Union. Cases 31–CA–029913, 31–CA–030021, and 31–CA–030088

June 25, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND GRIFFIN

On October 18, 2011, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent and the Charging Party each filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by requiring employees to distribute a coupon flyer that apologized to customers for union handbilling outside the Respondent's store. For the reasons stated below, we reverse the judge and find the violation.

The Respondent operates a chain of grocery stores. Since late 2009, the United Food and Commercial Workers International Union has conducted an organizing campaign at the Respondent's Eagle Rock store in Los Angeles. In March 2010, employees and union representatives presented the Respondent with a petition, signed by a majority of employees, indicating their support for the Union and requesting that the Respondent voluntarily recognize the Union as their collective-bargaining representative. The Respondent declined and stated that it would not recognize the Union without an election.

In late 2010, in continuation of the organizing campaign, off-duty employees of the Eagle Rock store and union representatives distributed prounion flyers in front of the store. Some customers were angry about the distribution and complained to store management.

In December 2010 and January 2011, the Respondent distributed a flyer, which included a $5 merchandise coupon on the back, apologizing to customers "for any inconvenience union protesters may have caused." The coupon flyer then set forth the following bullet points:

[1] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We adopt the judge's findings, for the reasons stated in her decision, that the Respondent violated Sec. 8(a)(1) by engaging in coercive interrogation, creating an impression of surveillance, and orally promulgating a rule prohibiting employees from discussing discipline. We also adopt the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by orally promulgating a rule prohibiting employees from discussing the Union during working time.

As to the interrogation, which involved Store Manager Pablo Artica questioning employee Jose Montiel-Rangel about whether he would attend a union safety meeting, we disagree with our colleague's conclusion that the questioning was not coercive. In doing so, we emphasize that Artica is the store's highest manager. We also find compelling that Artica continued to press Montiel-Rangel about the meeting even after Montiel-Rangel did not answer Artica's questions. Montiel-Rangel twice denied knowledge of the meeting and ultimately asked Artica who had "squealed" about the meeting. Finally, as discussed below, the interrogation was coupled with a statement implying that employees' union activities were under surveillance. Under the totality of the circumstances, we find the interrogation coercive. See *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *UNITE HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

As to the impression of surveillance, Artica responded to Montiel-Rangel's "who squealed?" question by commenting, "It's amazing what you can find on the internet." Our colleague notes that there is no evidence the union safety meetings were kept secret. Montiel-Rangel's reaction to Artica's inquiry, however, indicates that he was surprised by Artica's knowledge of the meeting. In any event, the relevant inquiry is whether the employer "did something out of the ordinary" to give employees the impression that their union activities were under surveillance. See *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003). In context, Artica's comment about the internet makes little sense other than to pointedly suggest that he had searched online for information about the union meeting. Under these circumstances, Montiel-Rangel would reasonably believe that Artica engaged in conduct that was out of the ordinary.

Member Hayes would find that the Respondent's store manager, Pablo Artica, did not coercively interrogate employees or create an impression of surveillance by asking employee Jose Montiel-Rangel if he was going to a union safety meeting. Montiel-Rangel was an active, open union supporter who had a friendly relationship with Artica. Artica casually asked Montiel-Rangel about the safety meeting when they were outside the store and on the way to retrieve Montiel-Rangel's bicycle after his shift. There is no evidence that the safety meetings were secret. Indeed, employees were open about their union activity. Under the totality of the circumstances, Member Hayes finds that Artica's question was not coercive. *Rossmore House*, supra. Similarly, Member Hayes would further find that Artica's question did not create an impression of surveillance. No employee would reasonably conclude—from the question—that his protected activities were being monitored. Again, there is no evidence that the meetings were secret. They were frequent and well attended, employees were open about their union activity, and union supporters had in fact demanded that the Respondent create a safety committee.

We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violations found and in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall substitute new notices to conform to the Order as modified.

- The protesters are **not** our employees and have been hired by the United Food & Commercial Workers (UFCW) union.
- The UFCW wants fresh&easy [sic] to unionize.
- We've told the UFCW this is a decision only our employees can make. They have not made this choice.
- We offer good pay as well as comprehensive, affordable benefits to all our employees.
- We take pride in being a great place to work.

(Emphasis in original.) Consistent with the standard practice at the Eagle Rock store pertaining to coupons, Pablo Artica, the store manager, instructed employees to personally hand the coupon flyer to customers, instead of placing it in the customers' bags or leaving a stack for the customers to help themselves.

In January, two employees complained to Artica about having to hand out the flyers. Employee Carlos Juarez refused Artica's direct order to hand the flyer to customers, telling Artica that the flyer lied to customers and infringed on his right to support the Union. Another employee, Jose Montiel-Rangel, ultimately acquiesced in Artica's order, but expressed displeasure with having to hand the flyer to customers because he supported the Union and was involved in the organizing campaign. Neither employee was disciplined.

In dismissing the allegation that the Respondent violated the Act by requiring employees to distribute the flyer, the judge acknowledged that an employer may not require employees to make an observable choice to support or oppose a union. She reasoned that, in determining whether distributing this flyer required employees to make an observable choice, the threshold question is whether the flyer "can reasonably be viewed as an antiunion communication or as a component of the company's campaign against union representation." She concluded that, because the flyer did not contain an antiunion message or otherwise "express a position on unionization," the employees distributing the flyer were not forced to make an observable choice.

We disagree. Contrary to the judge's suggestion, literature or other material need not contain an explicitly antiunion message in order to be part of an employer's campaign or otherwise implicate the employee's right to decide whether to express an opinion or remain silent. See, e.g., *2 Sisters Food Group*, 357 NLRB 1816, 1818–1819 (2011) (finding that employees were forced to make an observable choice on whether they supported the union when presented with T-shirts and beanies bearing the company logo when, under the circumstances, employees would have understood them to be campaign paraphernalia); *Dawson Construction Co.*, 320 NLRB 116, 117 (1995) (finding that the employer violated Section 8(a)(1) by compelling an employee to hold a reserve-gate sign because the employee became "a visible instrument in the implementation of the employer's decision to establish a reserve gate, thereby participating in the employer's statement about the labor dispute"); *R. L. White Co.*, 262 NLRB 575, 588–589 (1982) (finding that the employer violated Section 8(a)(1) by offering and encouraging employees to wear procompany T-shirts the day before a representation election). Rather, the key inquiry is whether employees would understand the material to be a component of the employer's campaign.

We find that the Respondent's employees reasonably would have perceived the flyer to be a component of the Respondent's campaign against union representation. The flyer was a direct response to the Union's protected handbilling. And, just as the Union's distribution of handbills to customers was intended to promote community support for their organizing effort, the Respondent's distribution of its flyer to customers sought to generate community opposition to the organizing effort. The flyer champions the Respondent as a "great" employer, while making two misleading statements to place the Union in a negative light. First, the flyer describes the Union's protesters as individuals who are "**not** our employees" and were "hired by the [Union]." In fact, off-duty employees voluntarily distributed the handbills alongside paid representatives of the Union. Second, the flyer states that the Respondent's employees have not chosen to unionize. In fact, as stated above, a majority of employees had authorized the Union to represent them. Although an employer has a right under the Act to decline voluntary recognition in favor of a Board election, the Respondent's statement in the flyer is misleading, at best.

Confirming our conclusion that employees reasonably would have perceived the coupon flyer as campaign material, two employees objected to distributing it. Both employees believed that distributing the flyer was inconsistent with their support for the Union, and one employee thought the flyer contained lies.

Because we find that employees would reasonably have perceived the flyer as a component of the Respondent's countercampaign against the Union, we find that the Respondent's requirement that employees personally hand the flyer to customers coerced employees in their choice whether to "participate in the debate concerning representation." *Allegheny Ludlum Corp.*, 333 NLRB 734, 741 (2001), enfd. 301 F.3d 167 (3d Cir. 2002). The Board has recognized that "an employee has a Section 7 right to choose, free from any employer coercion, the

degree to which he or she will participate in the debate concerning representation." Id. at 741; see also *Smithfield Packing Co.*, 344 NLRB 1, 3–4 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006). That right includes "the right to express an opinion or to remain silent." *Dawson Construction Co.*, supra, 320 NLRB at 117 (quoting *Texaco, Inc. v. NLRB*, 700 F.2d 1039, 1043 (5th Cir. 1983)). In the instant case, employees were not permitted to choose whether to express an opinion or remain silent; instead, they were "compelled to participate publicly in making the Respondent's statement" criticizing the Union's handbilling and its organizing campaign. *Dawson Construction*, supra.[3] Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(1).[4]

AMENDED CONCLUSIONS OF LAW

Insert the following as paragraph 4 of Conclusion of Law C.

"4. Requiring employees to distribute material that they reasonably would have perceived to be a component of the Respondent's campaign against union representation."

AMENDED REMEDY

The judge recommended a broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." We find that a broad order is not warranted under the circumstances of this case, and we substitute a narrow order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." See *Hickmott Foods*, 242 NLRB 1357 (1979).

We also amend the judge's recommended remedy to modify the locations of the notice posting. The judge recommended that a notice covering all violations be posted at all of the Respondent's Los Angeles-area stores. Other than the coupon-flyer violation, however, all of the violations were committed solely by Eagle Rock Store Manager Pablo Artica. Therefore, we find that a notice covering all of the violations must be posted only at the Eagle Rock store. Because the coupon flyer was distributed at 15 to 20 other stores throughout California, we find that a notice specific to the coupon-flyer violation must be posted at all other stores where employees were required to distribute the flyer.[5]

ORDER

The National Labor Relations Board orders that the Respondent, Tesco, PLC d/b/a Fresh & Easy Neighborhood Market, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(b) Coercively interrogating employees about their union activities.

(c) Orally promulgating, and thereafter maintaining, a rule prohibiting employees from discussing their discipline, a term and condition of employment, with other employees.

(d) Requiring employees to distribute materials that the employees reasonably would perceive to be a component of the Respondent's campaign against union representation.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and cease maintaining unlawful rules prohibiting its employees from discussing their discipline, and notify employees in writing that such rules have been rescinded.

(b) Within 14 days after service by the Region, post at its Eagle Rock store in Los Angeles, California, copies of the attached notice marked "Appendix A."[6] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken

[3] We note that the Respondent may lawfully use supervisors to distribute campaign material such as the coupon flyer to customers. The violation here was requiring the employees to do so.

[4] Contrary to his colleagues, Member Hayes agrees with the judge's finding that the Respondent did not violate Sec. 8(a)(1) by having its employees pass out the coupon flyers. In Member Hayes' view, the coupon flyer was not antiunion campaign material and it was not a component of the Respondent's campaign. The flyer was neutral as to unionization and did not advocate either a pro or antiunion view. Therefore, the Respondent's requiring employee distribution of the coupon flyer would not reveal any employee's view of unionization or enable the Respondent to assess an employee's sympathies.

[5] We leave the identification of these stores to the compliance phase of the proceeding.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed its Eagle Rock store, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at such store at any time since May 19, 2010.

(c) Within 14 days after service by the Region, post at all of its other stores where employees were required to distribute the coupon flyer described in this decision copies of the attached notice marked "Appendix B."[7] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any of the stores where the coupon flyer was distributed, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at such stores at any time since December 2010.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT coercively question you about your union activities or the union activities of other employees.

WE WILL NOT make and/or maintain any rule preventing you from discussing your terms and conditions of employment, including discipline, with other employees.

WE WILL NOT require you to distribute materials that you reasonably would perceive to be a component of a campaign against union representation at our stores.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights stated above.

WE WILL rescind and stop maintaining our unlawful rules prohibiting you from discussing your discipline, and notify all of you in writing that this has been done.

TESCO PLC D/B/A FRESH & EASY NEIGHBORHOOD MARKET, INC.

APPENDIX B

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Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT require you to distribute materials that you reasonably would perceive to be a component of a campaign against union representation at our stores.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights stated above.

TESCO PLC D/B/A FRESH & EASY NEIGHBORHOOD MARKET, INC.

[7] See fn. 6, supra.

John Rubin and *Rudy Fong, Attys.*, for the General Counsel.
Molly Eastman, Atty. (Seyfarth Shaw, LLP), of Chicago, Illinois, for the Respondent.
David Rosenfeld, Atty. (Weinberg, Roger, & Rosenfeld), of Alameda, California, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

LANA PARKE, Administrative Law Judge. Pursuant to charges filed by United Food and Commercial Workers International Union (the Charging Party or the Union), the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued order consolidating cases, consolidated complaint, and notice of hearing (the complaint) on April 29, 2011.[1] The complaint alleges that Tesco PLC d/b/a Fresh & Easy Neighborhood Market, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act).[2] This matter was tried in Los Angeles on August 1 and 2, 2011.

II. ISSUES

Did Respondent violate Section 8(a)(1) of the Act by the following conduct:

A. Creating an impression among its employees that their union activities were under surveillance.
B. Interrogating an employee regarding the employee's union activities.
C. Orally promulgating, and thereafter maintaining, a rule prohibiting employees from talking about the Union in the store, on the clock, or on the sales floor.
D. Orally promulgating, and thereafter maintaining, a rule prohibiting employees from discussing their terms and conditions of employment with other employees.
E. Telling employees to distribute anti-union flyers to customers.

III. JURISDICTION

At all material times, Respondent, a corporation and a subsidiary of Tesco, PLC, with an office and place of business at 4211 Eagle Rock Blvd., Los Angeles, California (the Eagle Rock store), has been engaged in the operation of retail grocery stores in multiple States. During the past calendar year, Respondent, in conducting its business operations at the Eagle Rock store, derived gross revenues in excess of $500,000, and purchased and received at the store goods valued in excess of $50,000 directly from points outside the State of California. Respondent admits, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

IV. FINDINGS OF FACT

Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings.

A. The Eagle Rock Store

Respondent operates a chain of grocery stores in a multiple states; the Eagle Rock store in Los Angeles is the focus of this case. During the relevant period, the Eagle Rock store was entirely self-checkout, i.e., customers rather than store employees scanned, bagged, and paid for their merchandise at eight electronic checkout stations. Customer associates (CAs) assisted customers in checking out, approved purchases of alcoholic beverages, gathered shopping carts, stocked product shelves and displays, and generally assured that customers had successful shopping experiences. Typically two to four customer associates worked at the same time. The customer associates reported to a team lead; generally one but sometimes two team leads worked at the same time. The team leads, in turn, reported to a store manager. On March 29 Pablo Artica (Artica) assumed management of the Eagle Rock store, a position he retained until May 2011.[3]

At the Eagle Rock store, management daily gathered employees into groups called "huddles" to dispense information about how the store was doing and to give work reminders. Employees were permitted to talk among themselves as they worked about matters unrelated to work so long as their productivity or customer service was not impeded.

Respondent's occasional practice at the Eagle Rock store was to distribute sales coupons to customers to promote repeat shopping. Sales coupons were generally kept at the self-checkout stations where they were to be given to customers who completed a purchase with the object of encouraging the maximum number of shoppers to return to the store to utilize the coupon. Respondent directed CAs to place the sales coupons in customer bags or hand them directly to customers. Respondent did not want the coupon fliers to be unrestrictedly available at checkout stations, as customers might take multiple copies, thereby reducing customer outreach.

B. Union Organizing Drive at the Eagle Rock Store

Between March 13–25, 17 employees of the Eagle Rock store signed a petition (employees' petition) that read:

[1] All dates herein are 2010, unless otherwise specified.

[2] At the hearing, the General Counsel amended the complaint to correct a misdate and misspelling and to add the names of road supervisors Eduardo Dominguez and Eugene Estrada as agents of Respondent within the meaning of Sec. 2(13) of the Act, which allegation was admitted by Respondent. The General Counsel also amended the complaint to omit the date of "June 2010" from subpar. 6(a) and to replace the words "On various dates in April, May, June, and July 2010" in subpar. 6(c) with the words "In about April 2010." The General Counsel further amended the requested remedy to seek a special corporate wide notice posting.

[3] Artica was a supervisor and/or an agent of Respondent within the meaning of Sec. 2(11) and (13) of the Act.

> I have made an informed choice and want the United Food and Commercial Workers (UFCW) as my bargaining agent. The undersigned constitute a majority of all regular, non-supervisory full-time and part-time employees at the Tesco Fresh & Easy store located at 4211 Eagle Rock Blvd. Los Angeles, California 90065 . . . we hereby call on Tesco Fresh & Easy to immediately recognize our union.

On March 26, union representatives, Brian Iwakiri and Keven Solsman, and two of Respondent's employees, Michael Acuna (Acuna) and Angel Salas (Salas), drove to Respondent's home office in El Segundo, California, where they met with Hugh Cousins (Cousins), Respondent's chief human resources officer. Salas gave Cousins the employees' petition, saying the Eagle Rock store employees wanted to be recognized by the Union. Cousins said the Company preferred to go to an election.

C. Alleged Promulgation of Unlawful Rules

In April, according to the testimony of Salas, during a huddle with four or five employees in the break room, Artica, who appeared to be reading from an email,[4] told the group they could not talk about the Union on the clock; they could only talk about it in the break room on their breaks or outside of the store when off the clock. Salas recalled little else of the meeting. No other witness testified to Artica having made such or similar state-ments to employees at that or at any other time, and no employee testified that he/she had been restricted from talking about the Union during work, which employees apparently freely did. Artica denied ever telling any employees they could not talk about the Union while working.

In late June-early July at work, Acuna asked a team leader why Artica had not addressed the attendance problems of an employee named Ricardo. The team leader told Acuna it was not his business. On July 5, Artica approached Acuna at work and asked him why he had inquired about another employee's discipline. Artica told Acuna it was none of his business to talk about another employee's discipline if the employee did not want to share the information. Artica warned Acuna he would be disciplined if he did not stop.[5]

D. Alleged Impression of Surveillance and Interrogation

In May, union representatives scheduled a meeting with Respondent's employees to be held a few miles from the Eagle Rock store on May 19, in which employee safety and training issues were to be discussed.[6] Artica was aware of the meeting.[7] Sometime before the meeting, as employee Jose Montiel-Rangel (Montiel-Rangel) walked with Artica to retrieve Montiel-Rangel's bicycle from a storage facility at the store, Artica asked Montiel-Rangel if he was going to the "meeting." When Montiel-Rangel feigned ignorance, Artica said, "You know, the meeting that you guys are having today, you know, your safety meeting."

Montiel-Rangel again disclaimed knowledge of any meeting, and Artica asked if he was going to take notes for him at the meeting. Montiel-Rangel asked who had squealed about the meeting, and Artica said, "It's amazing what you can find on the internet."[8]

E. Alleged Direction to Distribute Antiunion Flyers

Beginning in November, union organizers and employees distributed leaflets (two-sided English and Spanish) near the front entrance of the Eagle Rock store to customers and workers (union leaflet). The leaflets read, in pertinent part:

> Tell Fresh & Easy: Let Your Workers Freely Choose a Union Despite repeated requests from workers, Fresh & Easy has never recognized a union of their workers—instead choosing to fight their employees as they try to form a union. Administrative Law Judges in two states have found that Fresh & Easy broke the law by committing unfair labor practices. . . .
>
> All Fresh & Easy employees deserve the right to form a union, if they choose, free from intimidation and fear.

Some customers became contentious during distribution of the leaflets, and some customers complained to store management about the leafleting.

Sometime in December, Respondent prepared a flyer for distribution to customers that contained a $5 store coupon (Respondent's coupon flyer) and read in pertinent part:

- Sorry for any inconvenience union protesters may have caused you.
- The protesters are not our employees and have been hired by the [Union].
- The [Union] wants fresh & easy to unionize. We've told the [Union] this is a decision only our employees can make. They have not made this choice.
- We offer good pay as well as comprehensive, affordable benefits to all our employees.
- We take pride in being a great place to work

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[4] Salas inferred the email had issued from Respondent's district manager.

[5] Artica did not recall having that specific conversation although he recalled telling several people that individual employees' discipline is their own business. He denied telling any employee he/she could not talk about discipline. I found Acuna to be a reliable witness, and I accept his testimony.

[6] The May meeting was one of a series in which the Union discussed with employees proper lifting techniques, ergonomics, and avoidance of employee injuries.

[7] An otherwise uninvolved employee told Artica of the meeting. Artica testified he was interested in the meeting because he wanted to know how to improve safety at the Eagle Rock store.

[8] Michael Acuna (Acuna) testified to an earlier, very similar May 19 interaction among Artica, Montiel-Rangel, and Acuna, in which Artica asked the two employees if they could "make notations and suggestions as far as the safety meeting" they were going to have and bring it in to him. Montiel-Rangel did not corroborate Acuna's testimony of this conversation. It is difficult to reconcile Acuna and Montiel-Rangel's testimony, particularly as Montiel-Rangel was surprised by Artica's knowledge of the meeting, which he could not have been if the earlier discussion described by Acuna had taken place. I find it unnecessary to resolve the inconsistencies, as Acuna's account, even if accepted, would only add to the existing allegation and not create a different one.

Respondent instructed its CAs to distribute Respondent's coupon flyers to customers.[9] Employee Carlos Juarez (Juarez) observed various CAs putting copies of the coupon flyer in customer's bags or personally handing it to them.

On January 10, 2011, Artica noticed that Juarez was either not giving out the flyers or was just placing them in people's bags. Artica approached Juarez as he was helping a customer at checkout and asked, "Aren't you going to pass those [coupon flyers] out to the customers," adding that Juarez was supposed to do so.

Juarez told Artica he could not do it. When Artica asked if Juarez was refusing to pass out Respondent's coupon flyers, Juarez said Artica could not force him to do something against his will. Artica asked again if Juarez was refusing to pass out the flyers. Juarez said, "Pablo, you've got to respect my rights," saying the Union could be his religion. Artica asked Juarez a third and a fourth time if he were refusing to pass out Respondent's coupon flyers. In response to the fourth enquiry, Juarez said, "Yes, I am refusing to pass all of those flyers out because they're lying to customers." Artica walked away.[10]

In early January 2011, Artica directed Montiel-Rangel, who was working at the checkout stations, to ensure that every customer received a coupon flyer. For the next 20 minutes or so, Montiel-Rangel placed a flyer in a shopping bag of each customer upon checkout. Artica approached Montiel-Rangel, saying he had not seen Montiel-Rangel hand Respondent's coupon flyers to customers. Montiel-Rangel said he was placing Respondent's coupon flyers in shopping bags. Artica told Montiel-Rangel to physically hand Respondent's coupon flyers to customers. Montiel-Rangel demurred, saying that as a union supporter, he was not thrilled about having to hand the flyers to customers, but if it was part of his duties, he would do so. Thereafter, Montiel-Rangel handed coupon flyers directly to customers.

V. DISCUSSION

A. Interrogation and Creating the Impression of Surveillance

The complaint alleges that in June, Store Manager Artica interrogated employees about their union activities and created an impression that their union activities were under surveillance by Respondent.

On May 19, Artica asked an employee, Montiel-Rangel, if he were going to the union meeting scheduled for later that day, disclosing his knowledge of its purpose and asking the employee to take notes for him. The General Counsel argues that by Artica's conduct, Respondent interrogated Montiel-Rangel about his union activities. The General Counsel also argues that Artica's questions created the impression that he was keeping employees' union activities under surveillance.

Respondent contends that Artica learned of the May 19 union meeting through an employee's voluntary, uncoerced disclosure and that his later exchange with employees had the legitimate purpose of seeking information about potential safety problems, which the union meeting was expected to address.

Supervisory questioning of employees about union activity is not a per se violation of Section 8(a)(1) of the Act. The test is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with statutory rights. To support a finding of illegality, the words themselves, or the context in which they are used, must suggest an element of coercion or interference. *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). If the questioning meets that test, it may also be found to have created the impression of surveillance. See *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 642 (2011) (interrogation and creation of the impression of surveillance when, following a union meeting, employer asked employees who paid for pizza at the meeting).

Determining if Artica's statements constituted interrogation and/or created an unlawful impression of surveillance requires an objective test of whether, under the circumstances, Artica's conduct was such as would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act. See *Broadway*, 267 NLRB 385, 400 (1983) (citing *United States Steel Corp. v. NLRB*, 682 F.2d 98 (3d Cir. 1982)); *Fresh & Easy Neighborhood Market*, 356 NLRB 588, 588 fn. 2 (2011), citing *Double D Construction Group, Inc.*, 339 NLRB 303, 303–304 (2003) ("The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.").

I find Artica's May 19 statements to employees would reasonably and objectively have had a coercive effect. There is no evidence that knowledge of the union safety meeting was commonplace or inconsequential; indeed Montiel-Rangel's surprised, disclaiming reaction to Artica's questions evinces the contrary. In those circumstances, Artica's benign or even constructive purpose in inquiring about the union meeting is irrelevant. His probing must objectively have tended to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights and have thereby violated Section 8(a)(1) of the Act.

B. Promulgation and Maintenance of Unlawful Rules

The complaint alleges that Respondent unlawfully promulgated and maintained a rule prohibiting employees from talking about the Union in the store, on the clock, or on the sales floor. The evidence proffered to support that allegation is Salas' testimony that Artica told employee participants in a huddle that employees could only talk about the Union in the break room on their breaks or outside of the store when off the clock.

Salas did not demonstrate a general recall of what Artica said in the April meeting beyond the specific statements he testified to. Moreover, Salas did not set the statements he did recall in

[9] Respondent also assigned employees involved in its customer ambassador program to distribute Respondent's coupon flyers at the Eagle Rock and other Fresh & Easy stores where the Union leafleted. The customer ambassador program, in pertinent part, provided program employees with the opportunity to meet and greet customers outside Fresh & Easy stores and share with them information about various public relations matters including the company's position regarding unionization.

[10] This account reflects the testimony of Juarez, which Artica essentially corroborated.

any context, certainly not one sufficient for me to determine whether Salas' testimony showed a clear recollection of what Artica said or whether it reflected inferences he perhaps unwarrantedly drew. The General Counsel asserts that Respondent was found in *Fresh & Easy Neighborhood Market*, 356 NLRB at 593–594, to have committed an identical violation at the Spring Valley, California store. The evidence in that case established that in 2009, Paula Agwu, Respondent's corporate human relations manager, told an employee of the Spring Valley store that she could not hand out paperwork or brochures while on the clock or on the sales floor, but essentially conceded that employees could at those times discuss union matters. While Agwu's acknowledgment of employees' rights to discuss the Union during worktime did not, in the Board's view, cure a previous violation, it weakens any inference Salas may have drawn that Artica was articulating restrictions from an upper managerial email at the huddle and casts further doubt on his testimony in this regard. In these circumstances, I cannot rely on Salas' testimony of the statements.

The General Counsel bears the burden of proving that Respondent committed allegedly unlawful conduct. As I cannot rely on Salas' testimony, the General Counsel has not met its burden. I shall, therefore, dismiss complaint subparagraph 6(c).

The complaint also alleges at subparagraph (d) that Respondent unlawfully promulgated and maintained a rule prohibiting employees from discussing their terms and conditions of employment with other employees. The evidence adduced in support of the allegation shows that on July 5, Artica told employee Acuna not to talk about other employees' discipline on pain of incurring his own discipline.

Section 7 of the Act gives employees the right to engage in union activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act prohibits interference with, restraint, or coercion of employees in the exercise of those rights.

The Board considers that an employer's maintenance of a work rule violates Section 8(a)(1) if employees would reasonably construe the language of the rule to restrict the exercise of Section 7 rights, applying a standard articulated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004), and restated in *NLS Group*, 352 NLRB 744–745 (2008):

> If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights.

The Board has answered in the affirmative the question of whether employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. See *Caesar's Palace*, 336 NLRB 271 (2001);[11] see also *Verizon Wireless*, 349 NLRB 640, 658–659 (2007), (prohibiting employee discussion of workplace concerns relating to discipline abridges Sec. 7 rights). Artica's all-encompassing embargo on employees talking about other employees' discipline explicitly interferes with that right and violates Section 8(a)(1).

C. Directing Employees to Distribute Antiunion Flyers to Customers

The complaint alleges that Respondent violated Section 8(a)(1) when Artica told employees to distribute antiunion flyers to customers. The flyer in question, Respondent's coupon flyer, was directed to customers and distributed in response to customer complaints about lawful prounion activism outside the store. The flyer apologized for customer inconvenience, disclaimed employee involvement in the activism, asserted Respondent's position that employees had not chosen the Union to represent them,[12] and touted Respondent's good pay and affordable benefits.

The Board has held that an employer may not compel employees to express opposition to union representation:

> [A]n employee has a Section 7 right to choose, free from any employer coercion, the degree to which he or she will participate in the debate concerning representation. This includes whether to oppose the union independently of the employer's own efforts, or to oppose representation by, for example, wearing an employer's campaign paraphernalia or, alternatively, by appearing in an employer's campaign videotape. . . . A direct solicitation pressures employees into making an observable choice, and thereby coerces them in the exercise of their Section 7 rights.[13]

The Board also prohibits employers from requiring indirect participation in disseminating an antiunion message. See *Clinton Food 4 Less*, 288 NLRB 597 (1988) (the Board adopted the administrative law judge's decision that an employer who required an employee upon pain of discipline to distribute to each customer checking out at her register a copy of the employer's

[11] Although the Board found in *Caesar's Palace* that an on-going drug investigation justified the employer's conduct, the Board emphasized employees' right to discuss discipline.

[12] Given Respondent's refusal to accede to the Union's majority-supported petition for recognition, insisting instead that employees demonstrate union choice through a Board-conducted election, this assertion was overly simplistic although not explicitly inaccurate.

[13] *Smithfield Packing Co.*, 344 NLRB 1, 3–4 (2004) (requiring employee to stamp "Vote No" on hogs), quoting from *Allegheny Ludlum Corp.*, 333 NLRB 734, 741 (2001) (solicitation of employees to participate in an antiunion videotape lawful only upon certain assurances), and citing *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 496 (1995), enfd. in relevant part 97 F.3d 65, 72, 74 (4th Cir. 1996) (directing an employee to wear a "Vote No" T-shirt); *R. L. White Co.*, 262 NLRB 575, 576–577 (1982) (distributing and coercively encouraging employees to wear pro-employer T-shirts); *Florida Steel Corp.*, 224 NLRB 587, 588–589 (1976), enfd. mem. 552 F.2d 368 (5th Cir. 1977) (requiring employees to pose for photographs holding "vote no" signs). The Board found these employers' actions pressured employees into making an observable choice concerning their participation in an election campaign.

handbill opposing the union, thereby conveying its antiunion message, violates Sec. 8(a)(1) of the Act).

The above cases appear to pose a threshold question that must be answered before it can be determined whether Respondent's conduct in requiring employees to disseminate its coupon flyers was unlawful. That question is whether the coupon flyer can reasonably be viewed as an antiunion communication or as a component of the Company's campaign against union representation. In *Allegheny Ludlum*, supra at 745, the Board restricted its holding to campaign materials that "reasonably tend[ed] to indicate the employee's position on union representation." The Board "perceive[d] no basis for finding that the inclusion of employees' images in a videotape that [did] not convey a message about the employees' views concerning union representation, without more, would violate Section 8(a)(1)." Ibid. All cases cited above involve employer-required dissemination of an employer's antiunion or union oppositional position. Respondent's coupon flyer must, therefore, be reviewed with an eye for the explicit or implicit expression of any antiunion or union oppositional stance.

The General Counsel did not address this question directly, arguing, rather, that it is irrelevant whether Respondent's coupon flyer was explicitly antiunion. The pivotal consideration, in the General Counsel's view, is that the coupon flyer constituted campaign literature generally because it "reference[d] the Union's organizing campaign, apologize[d] to the public. . . boast[ed] about Respondent's business practices . . . [and] was a counter to the Union's flyer." By instructing Juarez and Montiel-Rangel to hand out its coupon flyer to customers, the General Counsel asserts, Respondent coerced them to act as its agents, thereby denying them their right to freely exercise Section 7 rights.

Respondent argues that its coupon flyer articulated neither a pro nor antiunion view. As the coupon flyer was neutral as to unionization, Respondent urges, employee distribution of it could not convey any employee's view of unionization or enable Respondent to assess his/her sympathies.

I am persuaded that Respondent's coupon flyer could in no way be viewed as antiunion campaign material. At most, the flyer was a self-serving attempt to conciliate irate customers by justifying the Company's lawful refusal to recognize the Union without an election and burnishing its image as a community asset. In neither tactic did Respondent malign or even refer negatively to the Union or to employee unionization. The mere fact that Respondent's coupon flyer was a byproduct of the union organizational drive, cannot convert the flyer into antiunion campaign material.

As Respondent's coupon flyer did not express a position on unionization, it could not have conveyed the union view, pro or con, of any distributing employee. Requiring employees to distribute the Respondent's coupon flyers to customers did not, therefore force employees into making an observable choice concerning their participation in an election campaign or "contravene employees' Section 7 right to choose whether to express an opinion [about unionization] or remain silent." *Allegheny Ludlum*, supra at 744–745. I shall, therefore, dismiss that allegation of the complaint.

CONCLUSIONS OF LAW

A. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

B. The Union is a labor organization within the meaning of Section 2(5) of the Act.

C. The Respondent violated Section 8(a)(1) of the Act by the following:

1. Creating an impression among its employees that their union activities were under surveillance.

2. Interrogating an employee regarding the employee's union activities.

3. Orally promulgating, and thereafter maintaining, a rule prohibiting employees from discussing their discipline, a term and condition of employment, with other employees.

D. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent will be ordered to post appropriate notices in the manner set forth hereafter.

The General Counsel and the Charging Party seek a broad notice, asserting that Respondent is a repeat violator of the Act. As the General Counsel points out, two prior Board decisions involving Respondent have recently issued: *Fresh & Easy Neighborhood Market*, 356 NLRB 546 (2011), finding that during the Union's organizing drive at Respondent's Las Vegas stores Fresh & Easy, Respondent unlawfully: (1) interrogated employees; (2) created the impression of surveillance; and (3) promulgated and maintained an unlawfully overbroad no-distribution rule; *Fresh & Easy Neighborhood Market*, 356 NLRB 588 (2011), finding that Respondent at its Spring Valley, California store, unlawfully (1) promulgated and maintained a rule prohibiting employees from talking about the Union while working; (2) prohibited employees from talking about their discipline with other employees while working; and (3) invited employees to quit their employment as a response to their protected activities. Given corporate oversight of the labor relations of individual stores and the repetition of conduct already found unlawful by the Board, I find a broad notice is appropriate. See *Hickmott Foods*, 242 NLRB 1357 (1979) (broad order warranted when a respondent is shown to have a proclivity to violate the Act).

The General Counsel and the Charging Party also seek corporate-wide notice posting because of corporatewide involvement in the distribution of Respondent's coupon flyer. The Charging Party seeks the additional remedy of requiring Respondent to pass out the Board's notice to customers. As I have not found that Respondent violated the Act by requiring employees to distribute its coupon flyer to customers, I find no

basis for ordering corporatewide posting or distribution of the Board's notice to customers.

The General Counsel seeks the additional remedy of notice reading to employees. The unlawful conduct found in this case does not constitute such serious, persistent, and widespread unfair labor practices as to require the notice to be read aloud.

[Recommended Order omitted from publication.]